

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1424

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V.

RAY JONES,

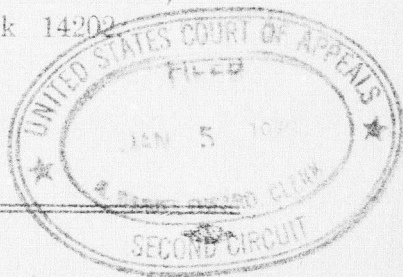
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF-APPELLEE

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No. 77-1424

THE UNITED STATES OF AMERICA,
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v.

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Appeal From the United States District Court for the
Western District of New York.

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

The Government agrees with the Preliminary Statement in defendant's brief.

Statement of Facts

In February, 1977, following an unusually severe blizzard which struck the Buffalo area, a presidential declaration authorized a food stamp program designed to provide

economic relief to the residents of the Western New York area. Because of this, approximately 25 million dollars worth of food stamps were distributed.

Not unexpectedly, there were reports of illegal dealings in food stamps, and the Department of Agriculture sent investigators into the area to work with local authorities, including the Erie County Sheriff's Department. The Department of Agriculture provided technical assistance, money, equipment, etc., and the Sheriff's Department proceeded to investigate leads of illegal food stamp transactions.

Utilizing an informant, James Riley, Sheriff's Detective Joseph Petronella, acting in an undercover capacity, approached the defendant's place of business, Ray Jones Collision Service, Inc. (Government's Appendix 64). The informant Riley entered the collision shop, and returned within a minute or so signalling Detective Petronella. Riley's role was merely to introduce the undercover agent to the defendant (Government's Appendix 59, 60). Detective Petronella did enter the shop, and within a few minutes sold \$500 in food stamps to the defendant for \$150 in cash (Government's App. 71, 72). The detective was also wearing a body tape recorder (Govt. App. 66) which, according to him, recorded accurately the entire conversation he had with the defendant (Govt. App. 70). The scene was also surveilled by a team from the Sheriff's Department and the Department of Agriculture. After the deal was completed Petronella left the shop and returned to his car (Transcripts of this recorded conversation, and a second one on February 28, 1977, are reprinted in defendant's Appendix at pages 220 to 224).

According to Detective Petronella, the defendant was interested in buying more food stamps and in fact suggested that the undercover agent contact him the next day at his place of business. Three days later, on February 28, 1977, Detective

Petronella called the defendant Jones, identifying himself as the person who had dealt with "those things" a couple of days previously (Govt. App. 75). Jones asked if Detective Petronella had any more, and Petronella told him he had "a thou"; defendant replied he couldn't handle that many, but would take \$200 worth (Govt. App. 75). Later that same afternoon, Petronella, alone in his undercover car, went back to the defendant's shop and again sold food stamps to the defendant, this time giving him \$200 in stamps for \$65 in cash. This transaction was also kept under surveillance, and according to Petronella the tape recording made of this conversation also accurately reflected the entire conversation.

During the second transaction, the defendant again expressed interest in more food stamps, and on March 8, 1977 and March 9, 1977 Detective Petronella contacted the defendant by telephone. On the 8th, Petronella stated he had more food stamps, with Jones replying that he wanted more but asking Petronella to call the next day to find out how many (Govt. App. 76, 77). Petronella testified that on the 9th, Jones asked him for \$4,000 worth of food stamps for \$1,000 in cash, with a request that Petronella stop by Friday, March 11, 1977 (Govt. App. 78, 79). (The agent never did consummate this planned sale).

On March 11, 1977, armed with warrants from the Magistrate, the U.S. Marshals arrested the defendant, Ray Jones, charging him with the two previous violations on February 25, 1977 and February 28, 1977. Taking the stand in his own defense, the defendant offered a somewhat contradictory version. That has been set out fully in the defendant's brief, and the Government feels there is no need to repeat it in its brief. It is sufficient to point out that the defendant's version, that is that he did commit the acts but was doing so out of fear that the undercover Detective Petronella was going to rob him, was apparently not believed by the jury.

Issues Presented

1. The defendant's actions in purchasing over \$100 worth of federal food stamps from an undercover agent, at a discount, is a felony violation of 7 U.S.C., § 2023(b).
2. The trial judges' refusal to excuse for cause two prospective jurors was within his sound discretion and was supported by the record.
3. The facts of this case clearly support the jury's finding that the defendant was not entrapped; the record clearly supports the conclusion that the defendant was predisposed to commit the acts charged in the indictment.
4. The facts of this case do not support defendant's contention that the Government's investigation amounted to "entrapment as a matter of law."
5. Judge Elfvin's limited use of transcripts of taped conversations between the defendant and the undercover agent was within his sound discretion, and the handling of the transcripts in this case was reasonable and proper.
6. The District Court properly allowed testimony relating to two phone conversations between the defendant and the undercover agent, concerning additional purchases of food stamps, and coming *after* the transactions for which the defendant was indicted; evidence of subsequent similar acts, or incriminating conversations, is relevant and admissible to show knowledge and intent on the dates of the crime.
7. There was no harm in the trial Court's striking of the proffered opinion evidence by one of defendant's character witnesses.

8. Judge Elfvin's instructions to the jury on the defense of entrapment were thorough and accurate; there was no basis for any instruction to the jury concerning the Government informant who was equally available to both parties, but who was not called to testify.

9. The prosecutor's reference to a transcript of the taped conversations between the defendant and the undercover agent was reasonable and proper; the transcripts had been prepared to aid in the trial, and such use was correctly allowed by the trial judge. Furthermore, the prosecutor's comments in summation were a correct statement on the law of an entrapment defense.

Title 7 U.S.C. § 2023. Violations and enforcement; issuance or presentment for redemption of coupons; penalties; coupons as obligations of United States

(a) Notwithstanding any other provisions of this chapter, the Secretary may provide for the purchase, issuance or presentment for redemption of coupons to such person or persons, and at such times and in such manner, as he deems necessary or appropriate to protect the interests of the United States or to insure enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter.

(b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization to purchase cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization to purchase cards are of the value of \$100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than five years or both, or, if such coupons or authorization to purchase cards are of a value of less than

\$100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned for not more than one year, or both.

(c) Whoever presents, or causes to be presented, coupons for payment or redemption of the value of \$100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter shall be guilty of a felony and shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than five years, or both, or, if such coupons are of a value of less than \$100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned for not more than one year, or both.

(d) Coupons issued pursuant to this chapter shall be deemed to be obligations of the United States within the meaning of section 8 of Title 18.

ARGUMENT

Point 1

The defendant's actions in purchasing over \$100 worth of federal food stamps from an undercover agent, at a discount, is a felony violation of 7 U.S.C., § 2023(b).

Defendant for the first time on appeal raises the argument that his discounted purchase of food stamps from an undercover investigator is not a violation of T. 7, U.S.C., § 2023(b) as a matter of law. His position that the agent's authority to conduct an investigation in cooperation with the Department of Agriculture rendered the transfer to him a legal one, and

his characterization of himself as a "designated recipient," is to pervert the very meaning of the Title 7 provisions making it a crime to acquire or possess food stamps in violation of the applicable regulations.

Judge Elfvin properly instructed the jury that the regulations governing acquisition of food stamps provide for the state agency administering the program to certify a household's eligibility and that only then can food stamps be issued legally. 7 CFR §§ 274.1, *et seq.*

There is no question that the defendant did not make proper application to any state agency, but rather purchased food stamps at his place of business, for a substantial discount, and from an undercover agent who gave absolutely no hint of any official capacity. The Judge instructed, and the jury properly found that this was a violation of T. 7, U.S.C., § 2023(b). To accept defendant's position would render undercover work of this kind impossible; defendant's argument is simply without merit.

Point 2

The trial judges' refusal to excuse for cause two prospective jurors was within his sound discretion and was supported by the record.

Defendant's argument that the Court's failure to excuse for cause two jurors is also without merit. The record of the *voir dire* demonstrates that neither juror should have been dismissed for cause, and both indicated an ability to keep an open mind and follow Judge Elfvin's instructions on the law.

Defendant points to juror Kimball's remark that she was strongly against getting food stamps illegally or unfairly, and that she had some doubt about her ability to make a final

judgment. Defendant claims that this clearly demonstrates she could not be an impartial or unbiased juror. Yet, these comments must be considered in the context of the whole *voir dire*, where she also stressed that she could be "very impartial" (Govt. App. 7-B) and that she had no bias or prejudice (Govt. App. 7). Additionally, the jurors as a group and individually had been advised and questioned on their obligations and abilities to require the Government to prove the defendant's guilt beyond a reasonable doubt (Govt. App. 6-A, 6-B, 6-C, 7).

The situation is similar with respect to juror Tedak. It is clear this juror was prepared to follow the Judge's instructions and require the Government to meet its burden. He acknowledged his obligation to consider the defense of entrapment (Govt. App. 30), stated that he would not tend to believe Government witnesses merely because they were connected with law enforcement (Govt. App. 31), agreed that he would consider the defendant's guilt solely from the evidence and the Judge's instructions (Govt. App. 31, 35, 40), and stated that he had no opinion of this case or this set of facts (Govt. App. 38).

Defendant raises juror Tedak's claimed misunderstanding of the presumption of innocence, yet the record is clear defense counsel's questions were put to him in "lawyerly" fashion, and when questioned by Judge Elfvin, the juror agreed with the principle that the defendant is presumed innocent (Govt. App. 40 to 42).

For all of these reasons, it is submitted that the defendant failed to demonstrate on the trial record any meaningful basis for his claim that these two jurors should be challenged for cause. Furthermore, an examination of the record as a whole indicated that both jurors indicated an open mindedness and

fairness, and were competent to sit as jurors. The fact that the defendant ultimately excused these two jurors with his peremptory challenges indicates that he may have found them personally unsuitable. However, there was no basis on the record for the Judge to dismiss the jurors for cause.

Point 3

The facts of this case clearly support the jury's finding that the defendant was not entrapped; the record clearly supports the conclusion that the defendant was predisposed to commit the acts charged in the indictment.

The defense of entrapment, once raised by Jones, requires the prosecution to demonstrate beyond a reasonable doubt that there existed a predisposition on the part of the defendant to (commit) the criminal act charged. *U.S. v. Russell*, 356 U.S. 369 (1958). Jones claiming he has adequately raised the issue of inducement, now argues that the Court should have reversed the conclusion of the jury that he was predisposed to commit the crime charged. This position should be rejected.

Jones, by his very acts and words, demonstrated his readiness and willingness to make the illegal food stamp transaction. Acting upon information he acquired from James Riley, a reliable informant, Detective Petronella first met with Jones on February 25, 1977. Jones clearly understood what was being offered him at that time, and he negotiated a purchase price of \$150 for \$500 worth of Food Stamps. That conversation ended with a deal within five minutes.

GOVERNMENT EXHIBIT 5

"Joseph Petronella: I'm at Ray's Collision. The date is 2-25-1977. I'm waiting for the owner to come out. I'm now entering Ray's Collision Shop.

Petronella: What's happening?

Ray Jones: Nothin much. (Unintelligible)

Petronella: I know, I mean I don't dig comin in with'em. That's why.

Jones: Ok, have a seat. Whadda ya got here?

Petronella: I got ah stamps.

Jones: Uh how many?

Petronella: A thou.

Jones: I can't handle a thousand.

Petronella: What could you handle? I'm looking for a third.

Jones: Well he's talkin' fifty cents . . .

Petronella: Well.

Jones: Cents on the dollar.

Petronella: A third is a little better for you.

Jones: Huh?

Petronella: A third is cheaper.

Jones: Well what are we gonna do?

Petronella: Three and a quarter for a thou.

Jones: Three and a quarter for a thou? I can't . . . damn, I can't get rid, I can't get rid of that many.

Petronella: No?

Jones: Unless I talk to him.

Petronella: Three hundred?

Jones: I can handle . . . ah . . . I can handle half of'em for ya.

Petronella: Gimme three hundred.

Jones: I can't, I ain't got three hundred first of all.

Petronella: Alright.

Jones: And I can't get rid of'em. I did all the checking I could get.

Petronella: Alright, five hundred for a hundred and a half.

Jones: Five hundred for a hundred and a half? Deal. Fifty-dollar books?

Petronella: Forty.

Jones: Forty-dollar books.

Petronella: That's four hundred, four eighty, seven, fourteen, sixteen, eighteen, twenty. That's five hundred.

Jones: A hundred and fifty bucks. Good deal.

Petronella: I don't dig you being here with a gun and me with nothin. Ah . . . well I'll have'em for the weekend if you want me to stop back or . . .

Jones: Check with me, alright?

Petronella: When?

Jones: I'll be here tomorrow.

Petronella: Alright, what time?

Jones: Around noon.

Petronella: Ok. How about later than that, or no?

Jones: No, I close, I close around three, Ok.

Petronella: Alright if I come anytime between . . . ah . . . twelve and three?

Jones: Ten and three.

Petronella: Ten and three tomorrow? Ok. That's a hundred and fifty. Ok Ray.

Jones: Ok, thank you.

Petronella: Just ask for you Ray?

Jones: Right.

Petronella: Ok.

Petronella: Just left the defendant (unintelligible) light skinned male, white shirt on, blue jeans, short hair. Gave me a hundred and fifty dollars cash for five hundred dollars worth of stamps. End of deal. The time of the deal was completed at 3:15."

[See Defendant's Appendix p. 220-222].

It is clear from this conversation that the defendant offered no hesitation or reluctance and in fact was quite disposed to transact with the undercover agent.

On their second meeting, three days later, Petronella brought Jones \$200 worth of food stamps. Jones, however, wanted to get another \$800 worth, telling Petronella he "wanted all of'em," and "I wanta' sell the whole grand for you." Not only did he willfully purchase the stamps offered, he eagerly sought to purchase more:

GOVERNMENT EXHIBIT 6

"Petronella: Time approximately 4:15 p.m. I'm in front of Ray Jones' Collision Service Incorporated. The address is 1736 North Fillmore.

Petronella: How ya doin. I got'em in the trunk. I don't wanna come in for'em.

Jones: Can't do that out here.

Petronella: Oh, I don't care, it's just me . . .

Jones: Damn.

Petronella: They're only four here. Ray? I only brought the two of'em. Well that's what you wanted. What did you want?

Jones: Wanted all of'em.

Petronella: Oh, ha!

Jones: I wan'ta sell the whole grand for you.

Petronella: Yea, but who knew?

Jones: Huh?

Petronella: How much you got?

Jones: I'd a sold the whole grand for you.

Petronella: I'll have to . . . ah . . . come back. How long will you be here?

Jones: Be here another fifteen twenty minutes. Can you make it back by then? Can ya? Alright what've we got here sixty bucks?

Petronella: Sixty-five dollars worth.

Jones: Sixty-five dollars worth. Alright there's sixty . . . and there's five.

Petronella: Alright how much money ya got there? What is it you want?

Jones: Huh?

Petronella: Tell me how much . . . how much more do ya want?

Jones: Well, what do you. Gimme another eight hundred dollars worth. Eight hundred dollars would be what?

Petronella: Two sixty?

Jones: Two fifty. I gave ya sixty-five so that would be a hundred eighty-five dollars more. Right? You owe me eight hundred dollars more.

Petronella: Alright.

Jones: Ok.

Petronella: Ok Ray.

Petronella: Just completed a deal from Ray the owner of the shop, light skinned black male, white shirt on, with the name "Ray" in the corner, blue pants, brown shoes, deal is completed and shut off the radio."

[See Defendant's Appendix p. 223-224].

Again, in only minutes, the defendant not only deals with the undercover agent, he urges the agent to return with additional food stamps. The defendant's argument that he was not predisposed did not convince the jury; he can hardly expect this Court now to accept that position.

One point should be mentioned here. The defendant has disputed the accuracy of the tapes, and the transcripts, although his claim apparently is that what is on the transcripts is accurate, but that they are incomplete. This became a jury question during the trial, and the jury apparently rejected the defendant's contention. They did so with good reason. The defendant advanced a theory that he feared the undercover agent was actually going to rob him, and that he went along with the transaction to prevent a robbery. It is submitted that his version and his justification were ludicrous, and the jury saw it for what it was worth. It should also be pointed out that the defendant denied that James Riley, the Government in-

formant, was present in his collision shop, instead insisting one Ronny Manns was present. This testimony was disputed by the undercover agent and two other Government witnesses called in rebuttal. The first, a detective with the Erie County Sheriff's Department who was on a surveillance team the day of the transaction on February 25, 1977, testified that Mr. Riley was the informant who had been working with the agents, and was the person who first approached the defendant, Ray Jones. The Government also called Ronny Manns, the individual that defendant Jones claimed was with Petronella. Mr. Manns, serving a term in state custody for a local charge, testified that he had never worked with the Erie County Sheriff's Office, did not know Agent Petronella, and was never an informant working on any food stamp investigations. Thus, Mr. Jones' credibility before the jury was put in issue, and this certainly had an affect on their believing that there were other considerations in Mr. Jones' mind at the time of these transactions. The jury exercised its perfect right to disbelieve the defendant, and on the other evidence that was available, predisposition was clearly shown.

It is submitted that the Government has met its burden of proving the defendant's pre-disposition by demonstrating that Jones was "ready and willing" to commit the crime charged. *U.S. v. Rosner*, 485 F2d 295 (CA 2, 1971) cert. denied, 94 SCt 3080; *U.S. v. Bishop*, 367 F2d 806 (CA 2, 1966); *U.S. v. Weiser*, 428 F2d 932 (CA 2, 1969) cert. denied. 91 SCt 1606; *U.S. v. Smalls*, 363 F2d 417 (CA 2, 1966) cert. denied. 87 SCt 755.

This Court has noted that a correctly charged jury that finds a defendant guilty should not be reversed unless the evidence of pre-disposition was too scanty to support a conviction, *U.S. v. Steinberg*, 551 F2d 510 (CA 2, 1977).

Point 4

The facts of this case do not support defendant's contention that the Government's investigation amounted to "entrapment as a matter of law."

Jones also argues that the Court erred in not finding entrapment as a matter of law. Jones argues that a basis for entrapment exists solely because of alleged Government "misconduct." Although, as Jones suggests, the decisions in *U.S. v. Russell*, 411 U.S. 423 (1973) and *Hampton v. U.S.*, 425 U.S. 484, (1976), do not clearly rule out such a theory, those options demonstrate a strong reluctance to find entrapment as a result of misconduct where the defendant has been shown to have been predisposed to commit the criminal act in question.

Jones would have this Court reverse his conviction based on the reasoning of cases like *U.S. v. Bueno*, 447 F2d 903 (CA 5, 1971). In *Bueno*, the entire transaction was arranged and discussed by a Government informer. The defendant purchased heroin in Mexico. With the informer's money and credit the heroin was smuggled into the U.S. by the informer who gave it to the defendant. The defendant was then induced to sell the heroin to a Government agent.

In the present case, however, Jones has not demonstrated any significant Governmental misconduct in this case, and in fact, none was present. Detective Petronella, acting upon information he acquired from James Riley, known to be a reliable informant, approached Jones and offered to sell him food stamp coupons at a fraction of their face value. The testimony disclosed that Jones eagerly engaged in this purchase and a second one three days later. The jury rightly found that he readily and willingly engaged in the transaction. In effect, the Government did no more than present

Jones with an opportunity to engage in an illegal transaction that he was clearly prepared to undertake. See also *U.S. v. Steinberg*, 551 F2d 570 (CA 2, 1977).

Defendant's position that the police conduct here was an outrageous, intolerable manufacture of crime is simply not supported by the factual record. His suggestion that a better investigative approach would have been to attempt to induce the defendant to *sell* food stamps borders on the ridiculous. While there is no dispute that the agents carefully planned their investigation, defendant's argument that such techniques are justified only when one is a member of a "highly organized secret society of criminals" reflects a gross misunderstanding of proper, legitimate police investigative techniques. His claim that the agents "sole intention was to instigate and create crime" is a serious distortion of their efforts to investigate a community problem.

Point 5

Judge Elfvin's limited use of transcripts of taped conversations between the defendant and the undercover agent was within his sound discretion, and the handling of the transcripts in this case was reasonable and proper.

The admission into evidence of the transcripts as prepared by the prosecution of conversations had between Jones and Detective Petronella on February 25, 1977 and February 28, 1977, is a matter within the discretion of the trial judge. *U.S. v. Kaska*, 443 F2d 1167 (CA 2, 1971).

The Government, in this case, prepared its transcript of the recordings and made available to Jones the recordings to

allow him to do the same; no defense versions were ever prepared. In fact, Jones never objected to the admissibility of these tapes because of their alleged inaccuracies when they were formally offered into evidence, but only objected on the ground that it was not necessary to assist the jury in listening to the tapes (Govt. App. 73-A, 73-B, 73-C). This Court has in the past considered similar circumstances to constitute a waiver on the part of the defendant of his right to object to the use of transcripts. *U.S. v. Chiarizio*, 525 F2d 280 (CA 2, 1975). See also *U.S. v. Onori*, 535 F2d 938 (CA 5, 1976).

Even assuming Jones truly objected to the use of the transcripts, they were still properly admitted. In *U.S. v. Carson*, 464 F2d 424 cert. denied, 93 SCt 268, this Court was faced with a situation where the parties gave different interpretations to tape recordings. This Court believed that the trial judge should hold an *in camera* hearing to resolve these disagreements. If no resolution, the proper procedure would be to allow each side to present its own transcript to the jury. Such procedure was approved again in *U.S. v. Bryant*, 480 F2d 785 (CA 2, 1973).

During his own cross examination, Jones was read the Government's transcripts line by line, agreeing that the statements contained therein were actually made by Petronella and him with minor exceptions. Jones, however, testified that the tapes omitted certain statements he said were made to him and was able to tell the jury what these statements were as well as give his own interpretation as to what was being said on the tape recordings. The matter of accuracy thus was better left for the jury to resolve.

The Government prepared an adequate foundation for the admissibility of the transcripts. Detective Petronella testified

that the transcripts accurately reflected the conversations he had with Jones. Petronella also testified that he never tampered with the tape machine so as to omit or alter its recording the conversations. This Court has in the past, approved the introduction into evidence of accurate transcripts for jury consideration. *U.S. v. Lam Lek Chong*, 544 F2d 58 (CA 2, 1976); *Chiarizio, supra*; *Bryant, supra*; *Carson, supra*.

The transcripts helped the jury to follow the recordings, particularly since it was difficult at times to identify by listening alone who was speaking and portions of the tape were relatively inaudible. *U.S. v. Onori*, 535 F2d 938 (CA 5, 1976); *U.S. v. McMillan*, 508 F2d 101 (CA 8) cert. denied. 95 SCt 1577.

Finally, the Court below properly presented a limiting jury instruction regarding the proper use and consideration the jury should have given to the Government's transcripts (Govt. App. 73-D, 73-E). See also *Bryant, supra* and *Kaska, supra*.

Point 6

The District Court properly allowed testimony relating to two phone conversations between the defendant and the undercover agent, concerning additional purchases of food stamps, and coming *after* the transactions for which the defendant was indicted; evidence of subsequent similar acts, or incriminating conversations, is relevant and admissible to show knowledge and intent on the dates of the crime.

Testimony by Detective Petronella concerning conversations he had with Jones on March 8, 1977 and March 9,

1977 (subsequent to the acts charged in the indictment) regarding the defendant's desire to purchase additional food stamps was properly admitted at trial for the limited purpose of showing the defendant had the requisite intent and knowledge to be found guilty under 7 U.S.C., § 2023.

Even though Jones never denied making the food stamp purchase, the Government still had the burden to prove he had the intent and knowledge to possess and acquire the stamps in a manner not authorized by law.

The testimony concerning the March conversations supported the Government's contention concerning the defendant's state of mind on February 25, 1977 and February 28, 1977. Such evidence was admissible within the discretion of the trial judge under *U.S. v. Natale*, 526 F2d 1160 (CA 2, 1975) cert. denied. 96 SCt 1724, as relevant to show Jones' intent and knowledge on those occasions.

This circuit has made it clear that incriminating conversations of this type between a defendant and a Government Agent, *subsequent* to the dates of the acts charged in an indictment, are admissible as bearing on the defendant's knowledge and intent on the dates charged. *U.S. v. Miranda*, 526 F2d 1319 (CA 2, 1975); *U.S. v. Rosenwasser*, 550 F2d 806 (CA 2, 1977).

Furthermore, Judge Elfvin properly cautioned the jury to limit their consideration of this evidence to the single question of the defendant's intent and knowledge on February 25, 1977 and February 28, 1977*, *U.S. v. Miranda*, *supra* (Govt. App. 79, 80). Contrary to the implication in

* It was and still is the Government's position that such evidence is particularly relevant where entrapment is the defense, although Judge Elfvin did not allow the jury to consider it as bearing on pre-disposition.

defendant's brief (p. 35) that the instruction was late in coming, Judge Elfvin gave this instruction during the Agent's testimony (Govt. App. 79, 80) as well as in his final charge to the jury (Govt. App. 141).

Point 7

There was no harm in the trial Court's striking of the proffered opinion evidence by one of defendant's character witnesses.

Although it may have been better practice for the Court to allow Russel Baker's character evidence in the form of opinion, by striking his testimony the defendant has not been unfairly prejudiced so as to require reversal of his conviction.

Mr. Baker's opinion was based on his conversations with Jones at the latter's place of business. Baker testified that he spoke with him "maybe twice a year." (Defendant's App. p. 79). In addition, he saw him socially at "Mr. Felicetta's retirement dinner" (Defendant's App. p. 79) and he and Jones got together "maybe once in three, four, five years" (Defendant's App. p. 80).

Jones character was adequately demonstrated through six other witnesses he called for that purpose. What added weight the jury would have given because of Baker's testimony is not apparent.

On appeal, the defendant also contends that Mr. Baker was precluded from testifying about the cooperation he had given to Mr. Baker and to the Buffalo Police Department. However, the record reveals that Jones never questioned Baker on that subject and that Baker's testimony was excluded only after defendant's attorney had completed his direct

examination (Defendant's App. pp. 77-78). If Jones was going to offer that evidence, that was the proper time. His contention *now* that Mr. Baker would give specific instances of good conduct is of little value to Judge Elfvin who was required to make a decision while the witness was on the stand.

And in any event, considering the defendant successfully presented six other witnesses relating to his good character, it does not seem the exclusion of this one witnesses' testimony should be considered such error as to reverse his conviction.

Point 8

Judge Elfvin's instructions to the jury on the defense of entrapment were thorough and accurate; there was no basis for any instruction to the jury concerning the Government informant who was equally available to both parties, but who was not called to testify.

Defendant argues that Judge Elfvin erred in instructing the jury on the law of entrapment—this position is wholly without merit and should not be given serious consideration on appeal.

Defendant blindly adheres to a notion that there was entrapment as a matter of law, simply because the undercover agent and informant initiated contact with the defendant. Throughout the trial, and now on appeal, he complains that the indictment should be dismissed for this reason.

Judge Elfvin, who heard all the testimony and observed all the witnesses, found otherwise and repeatedly denied the defendant's motions for dismissal and acquittal. The District

Court found that if the jury chose to believe the Government witnesses, "there would be sufficient evidence . . . to justify the jury in deciding that . . . Mr. Jones was a ready, willing and predisposed participant." (Govt. App. 82-B, 82-C, 82-D).

It is submitted that all of Judge Elfvin's remarks during *voir dire* were substantially correct statements of the law, and his charge to the jury at the close of the case was an accurate and thorough statement of the law of the entrapment defense (Govt. App. 124, 133, 138-143). *U.S. v. Rosner*, 485 F2d 1213 (CA 2, 1973).

Defendant's excerpts from Judge Elfvin's comments during *voir dire* are taken out of context. While it is not practical to repeat all of the Judge's remarks in this brief, it is submitted that taken as a whole, Judge Elfvin did everything possible to fairly and accurately instruct the jurors on their obligations to consider an entrapment issue (See especially Govt. App. 11, 13-14, 23, 25-26, 45-B, 45-C, 45-D). This is especially relevant considering that Judge Elfvin allowed defense counsel wide latitude in questioning the prospective jurors, and the issue of entrapment was repeatedly raised before the panel (See especially Govt. App. 12, 13, 17, 23-A, 36-A, 45-A).

Defendant also argues that the absence of the Government informant, James Riley, precluded a reasonable inquiry into the question of entrapment, and in a very vague way infers that Judge Elfvin should have given some particular instruction to the jury on this issue.

The Court was correct in refusing to give any requested charge regarding informant Riley. The defense had an opportunity to question Mr. Riley prior to trial and the Government made sure that he was available in the federal building to be called as a witness (Govt. App. 2-4, 47-56, 84). The de-

fense, however, chose not to call him. Since Mr. Riley was available to both sides, there was no basis for the Court instructing on either an "unfavorable inference" charge or a "missing witness" charge. *U.S. v. Dixon*, 536 F2d 1388 (CA 2, 1976); *U.S. v. Deutsch*, 451 F2d 98 cert. denied, 92 SCt 682; *U.S. v. Greenberg*, 445 F2d 1158 (CA 1971).

Defendant makes mention that there was some "question as to the informant's true identity" (defendant's brief, p. 42). This is misleading. The Government disclosed the name of its informant and made the informant available for questioning by defense counsel. It was the defendant who insisted, at trial, that the informant was one Ronnie Manns, not James Riley. It was for this reason, to rebut this contention, that the Government called in rebuttal a surveillance officer (to corroborate that it was Riley who was present) and Ronnie Manns himself, who denied being involved in any way.

Point 9

The prosecutor's reference to a transcript of the taped conversations between the defendant and the undercover agent was reasonable and proper; the transcripts had been prepared to aid in the trial, and such use was correctly allowed by the trial judge. Furthermore, the prosecutor's comments in summation were a correct statement on the law of an entrapment defense.

The Government's use of the transcript during cross-examination and summation was proper. They were used merely as an aid for the prosecutor to refer to rather than unnecessarily having him memorize the complete conversations.

Jones testified on direct examination that the tapes and transcripts were incomplete. He added statements he said were excluded and otherwise interpreted the conversations for the jury. The Government, through Detective Petronella, had previously asserted the accuracy of the tapes and transcripts. Therefore, the Government in referring to the transcripts were merely relying on the proof it had already presented in order to discredit Jones' claim. On cross-examination Jones was questioned on the accuracy of the statements in the transcript, and conceded that the tapes and transcripts were essentially accurate, for those comments they included. The Government could have made notes as the tapes were being played and then referred to them during cross-examination; it is difficult to see how the prosecutor's use of his own copy of a transcript made any difference.

In fact, Jones could have prepared his own transcript or notes but instead relied on summarizing its case from memory. There is no indication the jury was swayed merely because the prosecutor read from the transcript.

Furthermore, during summation, the prosecutor stressed that the question of who and what to believe was up to the jury, but that the tape should be convincing evidence. With respect to the transcript, however, it was pointed out that its use was merely to assist the prosecutor in making his argument and the jury should use their recollection of the tapes in deciding the case (Govt. App. 94-96, 104, 109-110).

Of course, the Court gave the jury proper limiting instructions regarding the transcripts when they were offered into evidence, (Govt. App. 73-D, 73-E) during its instructions, (Govt. App. 150-151) and following a request by the jury to see the transcripts during deliberations, (Govt. App. 174-175). This Court has approved the use of limiting instruc-

tions when transcripts are admitted, *U.S. v. Bryant*, 480 F2d 785 (CA 2, 1973) and *U.S. v. Kaska*, 443 F2d 1167 (CA 2, 1971). The jury was capable of appreciating these directions and presumably limited their consideration of the transcripts in accordance with the Court's guidelines.

Finally, the prosecutor's use of the word force or coerce in the context of the entrapment defense, was not error. As previously mentioned, Judge Elfvin gave an accurate instruction on entrapment. It is submitted that the prosecutor's arguments on entrapment, taken as a whole, also reflect a correct statement of the Government's burden of proof and a legitimate argument of the Government's position in this case (Govt. App. 90-95, 105, 121-122).

Clearly, the Government's comments during summation "did not transgress the broad limits within which counsel for both sides are entitled to argue." *U.S. v. Dibrizzi*, 393 F2d 642 (CA 2, 1968).

Conclusion

For the foregoing reasons, the conviction of Ray Jones should be affirmed.

Respectfully submitted,

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County of Genesee)
City of Batavia)

USA vs. RAY Jones
77-1424

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Sworn to before me this
3rd day of January, 19 78

Patricia A. Lacey

PATRICIA A. LACEY
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